6-10-2015

James A. Pritchard III, Order and Judgment on Plaintiff's Motion for Partial Summary Judgment as to Defendant Morris, Schneider, Wittstadt, LLC

Melvin K. Westmoreland
Fulton County Superior Court, Judge

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JAMES A. PRITCHARD, III,	
Plaintiff,	
v.	
DIVOT HOLDINGS, LLC, MORRIS | SCHNEIDER | WITTSTADT, LLC f/k/a/ MORRIS | HARDWICK | SCHNEIDER, LLC & NATHAN HARDWICK, IV,	**Civil Action File No. 2014CV252435**
Defendants	
MORRIS | SCHNEIDER | WITTSTADT, LLC f/k/a/ MORRIS | HARDWICK | SCHNEIDER, LLC	
Third Party Plaintiff	
v.	
ROY ANTHONY ADAMS & ALLIANCE FINANCIAL PROFESSIONALS, LLC	
Third-Party Defendants	

ORDER AND JUDGMENT ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO DEFENDANT MORRIS| SCHNEIDER| WITTSTADT LLC

This matter is before the Court on Plaintiff James A. Pritchard, III's Motion for Partial Summary Judgment as to Defendant Morris| Schneider| Wittstadt, LLC f/k/a Morris| Hardwick| Schneider, LLC. Upon consideration of the briefs and materials submitted on the Motion, oral argument of counsel and the record of the case, this Court finds as follows:

Summary judgment should be granted when the movant shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." O.C.G.A. § 9-11-56(c). To avoid summary judgment, "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this Code section, must set forth specific facts showing that there is a genuine issue for trial." § 9-11-56(e). "Supporting and opposing affidavits shall be made on personal knowledge" and "shall set forth such facts as would be admissible in the evidence." *Id.* The Court views the evidence in the light most favorable to the nonmoving party. *Morgan v. Barnes,* 221 Ga. App. 653, 654 (1996).

It is undisputed that in late July or early August of 2014, Defendant Nathan Hardwick, IV ("Hardwick") approached Plaintiff James A. Pritchard, III ("Pritchard") for a loan of $2 million (the "Loan"). Roy Adams, an accountant with Alliance Financial Professionals, LLC ("AFP") who has worked for Pritchard, Hardwick, Divot, and MSW, made the introduction. The money was sought to cover shortages in escrow accounts of Defendant Morris | Schneider | Wittstadt, LLC f/k/a Morris | Hardwick | Schneider, LLC ("MSW").[1] AFP was also hired to advise MSW regarding the escrow account shortages. Pritchard avers he reviewed MSW's audited financial statements before making the Loan and relied on these statements to assess whether MSW's Guaranty was valuable and would be honored. It is undisputed Pritchard loaned $2 million to Defendant Divot Holdings, LLC ("Divot"), an entity owned by Hardwick, and signed a number of loan documents prepared by Frederick Boynton, an attorney with MSW, including:

(1) a Promissory Note signed by Divot to repay the $2 million (the "Note");

[1] Morris | Hardwick | Schneider, LLC was owned by Mr. Hardiwck, Mark Wittsstadt, and Ron Wittstadt.

(2) a Pledge and Security Agreement signed by Hardwick securing Divot's repayment of the Promissory Note with interest in Holabird Abstracts, Inc. (a company affiliated with Hardwick) (the "Pledge"); and

(3) a Guaranty of Promissory Note by MSW in favor of Pritchard, executed by Hardwick as the then managing partner of MSW, guaranteeing performance of the Promissory Note and the Pledge Agreement. (the "Guaranty") (collectively, the "Loan Documents").

On the afternoon of August 4, 2014, after the Loan Documents were executed, Pritchard wired $2 million (the "Loan") to a Divot bank account. On the morning of August 5, Divot wired $2 million of funds from Divot's account to MSW's Equity Partner Account, an account specially set up to cover the escrow shortfalls.

Pritchard later discovered Hardwick was being accused of embezzling funds from MSW and that he had resigned from MSW by August 27, 2014. Divot defaulted on the Loan by failing to make a payment on September 4. To date no payments have been made on the Loan. In letters dated September 5, 2014, to MSW and Divot, Pritchard gave notice of the default and accelerated the Loan balance, demanding payment of the full amount plus all accrued interest. In a letter dated October 1, 2014, MSW informed Pritchard it refused to pay because it had no prior knowledge of the Guaranty and had not authorized Hardwick to execute the Guaranty on MSW's behalf.

Pritchard is now suing MSW for (1) breach of the guaranty contract and alternatively (2) money had and received and moves for summary judgment on both counts against MSW as a matter of law. Pritchard also seeks immediate repayment of $2 million principal, plus interest accruing at 18% per annum since September 4, 2014 until payment as provided for in the Note,

plus attorneys' fees under the Note of 15% of the entire amount of principal and interest at the time of collection. Pritchard requests the Court direct the entry of final judgment against MSW pursuant to O.C.G.A. § 9-11-54(b).

I. Breach of Contract

Pritchard argues that even if Hardwick did not have the authority to bind MSW to the Guaranty (a position with which the parties disagree), MSW ratified the Guaranty after receiving the September 5th letter seeking to enforce the Guaranty by refusing to return the benefit gained by entering into the Guaranty (the $2 million). Under O.C.G.A. § 10-6-51: "The principal shall be bound by all the acts of his agent within the scope of his authority; if the agent shall exceed his authority, the principal may not ratify in part and repudiate in part; he shall adopt either the whole or none." Therefore, Pritchard argues MSW cannot repudiate the Guaranty as they attempted to do on October 1st, but still retain the benefit of the Guaranty as a matter of law.

In response, MSW argues that under the equal dignity rule, the ratification of a contract that must be in writing under the Statute of Frauds must also be in writing. *See Turnipseed v. Jaje*, 267 Ga. 320, 324 (1996) (finding that ratification of real estate contract executed by unauthorized agent must be in writing in the absence of partial performance); *Lee v. Green Land Co.*, 245 Ga. App. 558, 560 (2000) (holding that ratification of a real estate contract executed by an unauthorized agent requires writing in absence of partial performance). A guaranty must be in writing under O.C.G.A. § 13-5-30(2) and so MSW argues the ratification of the Guaranty must also be in writing. However, an exception to this rule exists under the case law when a party has partially performed under the contract and Pritchard is arguing MSW has retained the benefit of the bargain which amounts to partial performance, and therefore, in this case oral ratification is sufficient under the law.

MSW then argues even if the law did not require a writing, it did not ratify the agreement through silence or performance because it expressly disavowed any obligation under the Guaranty to repay Pritchard including carrying out its one and only duty under the Guaranty—to guaranty full and prompt payment of the Loan—as soon as it was notified of the Guaranty in September. It is undisputed MSW was not silent in that it sent a letter on October 1st to repudiate the Guaranty. But again, the issue still remains whether MSW partially performed by retaining any benefit of the Guaranty and only disavowed its obligation.

Turning to the argument that the Guaranty was partially performed, MSW first argues it did not benefit from the Guaranty which is the only one of the Loan Documents to which it is a party and the Guaranty, read alone, only saddles it with burdens. MSW claims the Loan benefitted Hardwick and Divot, who had a responsibility to repay amounts wrongly obtained from the MSW escrow accounts by them, MSW's clients, and the title insurers who insured client funds held in escrow by MSW under closing protection letters.

The Court is not persuaded by this argument. MSW's argument overlooks the fact the Guaranty expressly states that the guarantee is given "in consideration of the benefits to be derived by Guarantor from said loan. . ." The Guaranty expressly binds the firm to the obligations arising under both the Note and the Pledge. Further, it is common sense that MSW benefitted from the Loan—the firm was ultimately responsible to its clients for the safekeeping of their money held in escrow. Ultimately, the firm avoided liability by accepting the benefits of the loan from Pritchard to Divot.

Under Georgia case law, receiving and retaining a benefit of a contract is part performance. In *Lanier*, the plaintiff, Citizens' Bank, made a loan to Williamson Manufacturing Company. *See Lanier Ins. Agency, Inc. v. Citizens Bank, Hogansville*, 168 Ga. App. 424 (1983).

The Vice President of Defendant Lanier Insurance Company executed a guaranty of the loan on behalf of Lanier even though he was not authorized to do so. Williamson then used the money to pay off its debt to Lanier. When Williamson defaulted on the loan, Citizen sought enforcement of the guaranty. The Court of Appeals noted that "where a corporation knowing all the facts accepts and uses the proceeds of an unauthorized contract executed in its behalf without authority, the corporation may be bound because of ratification." *Id.* The Court of Appeals determined that Lanier's "retention of the benefits flowing from the acts of [its vice president] is 'implied ratification.'" *Id.* The circumstances in the instant case are virtually identical to those in *Lanier*. Pritchard loaned money to Divot. Hardwick, the Managing Partner of MSW, executed the Guaranty on behalf of MSW and then Divot provided the loaned money to MSW. As such, under controlling precedent, MSW impliedly ratified Hardwick's execution of the Guaranty by retaining the benefits of the Loan.

MSW next argues there are disputed facts about what the two other partners in MSW, Rod and Mark Wittstadt, knew about the terms of the Loan beforehand. The Wittstadts aver they were told before Hardwick executed the Guaranty that Hardwick would personally reimburse the firm for any shortages in the escrows and they were never told Hardwick would be obligating the firm. Taking these averments as true does not lead to a different result. "Ratification is applicable to their post-contract conduct," not pre-contract conduct. *See Turnipseed v. Jaje*, 267 Ga. 320, 324 n.1 (1996). Therefore, the Wittstadts' pre-Loan understanding is not relevant to the ratification argument. In *Lanier*, the defendant was likewise unaware of the guaranty executed on its behalf when it accepted borrowed funds from its debtor.

MSW also points to an August 28th email (post-Loan) in which Pritchard asks his accountant whether he thought MSW even knew about the Loan. When considered in context,

Mr. Pritchard sent this query to his accountant after he saw news reports that Hardwick had been accused of embezzling MSW escrow funds and had resigned from the firm. Regardless, MSW does not explain how Mr. Pritchard's post-Loan actions are relevant to the ratification theory.

MSW also argues it was Divot's money and not Pritchard's money that was paid to MSW since the money was co-mingled in Divot's account. They argue the cases cited by Plaintiff are distinguishable from the case at hand because those cases were premised on an undisputed tangible benefit received from the plaintiff and that comingled money in Divot's account is not tangible and there has been no effort to conduct expert fund tracing. This argument overlooks the *Lanier* case, discussed above, in which the defendant, Lanier, received the proceeds of a loan from Citizens to Williamson as payment. It also overlooks Hardwick's affidavit testimony that Pritchard wired the $2 million in funds to his Divot account, from which he caused the funds to be wired to the law firm's account set up to cover the escrow shortages. Defendants have not presented any evidence calling into question the fact that the $2 million received from Pritchard was sent directly to MSW by Divot within the span of two days.

Finally, MSW claims it was entitled to the money from Divot as repayment for improper disbursements to Divot and Hardwick regardless of how Divot and Hardwick obtained the money. MSW relies on a Georgia Supreme Court case from 1899 that held the principal did not ratify the unauthorized oral contract of its agent because it received notes that it was entitled to in a separate written agreement. *See Baldwin Fertilizer Co. v. Thompson*, 106 Ga. 480 (1899). A federal case is also cited as persuasive. Kiwi Airlines "bought" advertising through its ad agency, LHC, from an advertising broker, Synergy. *Synergy Worldwide, Inc. v. Long, Haymer, Carr, Inc.*, 44 F. Supp.2d 1348, 1352 (N.D. Ga. 1998). Under an initial July agreement, Kiwi was to pay "Kiwi credits" to both LHC and Synergy as their commissions—one Kiwi credit for

every dollar of advertising. *Id.* In August, a Synergy representative presented a revised agreement to an LHC low-level employee which, among other promises, made LHC and Kiwi jointly liable to Synergy. *Id.* at 1353. The LHS employee did not have authority to sign, but signed it anyway without LHC's knowledge. *Id.* After the Court found the LHC employee had no authority, Synergy argued LHC ratified the agreement by accepting Kiwi credits. *Id.* at 1356. The Court held LHC did not ratify the August agreement by accepting the Kiwi credits it was already entitled to under the July agreement. *Id.*

The case at hand is distinguishable from both of these cases, however, because there is no evidence of a prior enforceable agreement entitling MSW to $2 million from Hardwick and Divot, only allegations that they owed MSW and had promised to replenish the accounts. Regardless, a pre-existing debt in *Lanier* that Williamson owed Lanier did not prevent the Court from applying ratification. *Lanier*, 168 Ga. App. 424 (1983). Similarly, in this case, a debt owed by Divot or Hardwick to MSW will not prevent the Court from finding that MSW impliedly ratified the Guaranty by retaining the benefits conferred to it.

As such, the Court finds that MSW ratified the Guaranty by retaining the benefit of the bargain and Plaintiff's motion for summary judgment on his breach of contract claim against MSW is **GRANTED.**

II. Monies Had and Received

Having found the Guaranty is enforceable against MSW under the theory of ratification, there is no need for the Court to address the alternative equitable claim for money had and received.

Although this Order grants relief against Defendant MSW only and not Defendants Divot or Hardwick, the Court determines there is no just reason for delay and directs entry of final

judgment pursuant to O.C.G.A. 9-11-54(b). As such, this Order constitutes a final judgment against Defendant Morris|Schneider| Wittstadt, LLC in the amount of $2,616,454.19 as of June 10, 2015, which includes all outstanding principle, interest and fees, with interest and fees accruing at the rate of $1,134.24 per day.

SO ORDERED AND ADJUDGED, this 10th day of June, 2015.

THE HONORABLE MELVIN K. WESTMORELAND
SENIOR JUDGE
Fulton County Superior Court – Business Case Division
Atlanta Judicial Circuit

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